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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDY HUMBERTO ALVARADO,

Defendant and Appellant.

G047782

(Super. Ct. No. 10CF0890)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Eddy Humberto Alvarado appeals from a judgment after a jury convicted him of willful, deliberate, and premeditated attempted murder, assault with a firearm, and street terrorism, and found true street terrorism, firearm, and great bodily injury enhancements. Alvarado argues the trial court committed evidentiary and sentencing errors. None of his contentions have merit, and we affirm the judgment.

FACTS

Alvarado and at least four friends approached a group of about six men, including Luis Ramon, on a street in Santa Ana. Alvarado was an active participant in “Crazy Little Stoners” (CLS) criminal street gang. Ramon was an active participant in a rival gang, “Brown Evil Soldiers” (BES). Someone in Alvarado’s group issued a gang challenge to someone in Ramon’s group. As Ramon approached Alvarado’s group, members of Alvarado’s group yelled, ““Crazy Little Stoners”” and ““CLS”” and one person displayed his CLS tattoo. Alvarado said to Ramon, ““Hey, I thought we were going to fight.”” Ramon replied, ““You’re a fucking mama’s boy.”” Alvarado said, ““I’m going to blast you,”” and he pulled a handgun from his waistband. Alvarado shot Ramon one time in the chest, which was nearly fatal.

An amended information charged Alvarado with willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))¹ (count 1), assault with a firearm (§ 245, subd. (a)(2)) (count 2), and street terrorism (§ 186.22, subd. (a)) (count 3). The information alleged the following enhancements: (1) Alvarado committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); (2) during the commission of count 1 he was a gang member who vicariously discharged a firearm causing great bodily injury (§ 12022.53,

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

subds. (d) & (e)(1)); and (3) he personally used a firearm (§ 12022.5, subd. (a)), and inflicted great bodily injury (§ 12022.7, subd. (a)), as to count 2. Finally, the information alleged he suffered a prior strike conviction (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), a serious felony conviction (§ 667, subd. (a)(1)), and a prior prison term (§ 667.5, subd. (b)). The prior conviction allegations were based on a 2008 conviction for robbery (§§ 211, 212.5, subd. (c)), in Orange County Superior Court case No. 08CF1577. Before trial, Alvarado waived his right to a jury trial on the prior conviction allegations.

At trial, the prosecutor offered the testimony of criminal street gang expert, Officer Eric Rivas. After detailing his background, training, and experience, Rivas testified concerning the culture and habits of traditional, turf-oriented criminal street gangs, and specifically CLS. During Rivas's testimony concerning CLS, there was a discussion outside the jury's presence regarding the scope of Rivas's testimony on the predicate offenses. The prosecutor requested he be allowed to introduce Alvarado's 2008 gang-related robbery conviction to establish the following: (1) CLS is a criminal street gang; (2) Alvarado had knowledge of the pattern of criminal activity; and (3) CLS's primary activities. Defense counsel objected, arguing the prosecutor effectively sought to introduce propensity evidence in violation of Evidence Code section 1101, subdivision (a), and there was a "cleaner way" to establish the predicate offenses because the evidence was unduly prejudicial under Evidence Code section 352.

Relying on *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*), the trial court ruled the prosecutor could introduce Alvarado's 2008 robbery conviction to establish the street terrorism substantive offense and enhancement. The court then turned to Evidence Code section 352 to determine whether the 2008 robbery conviction was more prejudicial than probative. The court began, "So looking at the [Evidence Code section] 352 analysis, and it's actually the same [Evidence Code section] 352 analysis that the court went through in the *Tran* case, it's weighing the factors of prejudice

outweighed by probative value.” After recognizing gang-related evidence is prejudicial, the court discussed *Tran* and its holding a defendant’s prior gang-related conviction is probative to establish a predicate offense. In conducting the Evidence Code section 352 analysis, the court stated, “So going through that [Evidence Code section] 352 analysis, is the probative value greater than the prejudice? According to *Tran* it is.” The court explained the 2008 robbery conviction was probative because it emanated from a source independent of the charged offenses. The court added admission of the 2008 robbery conviction would not confuse or mislead the jury. After a lengthy discussion of the Evidence Code section 352 issue, the court concluded, “So I know it’s long winded, what I’m saying, but I think it’s very, very important that we have a thorough and full analysis of this particular issue because it’s actually a big issue. It’s come up before.”

Rivas provided testimony that established CLS was a criminal street gang as statutorily defined, including testimony concerning the predicate offenses, one of which was Alvarado’s 2008 robbery conviction. Based on his review of the case and investigation, he opined Alvarado was an active participant in CLS at the time of the offenses. Based on a hypothetical matching the facts of the case, Rivas opined the offenses were committed to promote and for the benefit of a criminal street gang because the violent offenses enhance the gang member’s and the gang’s reputation. Alvarado offered an alibi witness, who the prosecutor attempted to impeach.

As relevant here, the trial court instructed the jury with CALCRIM No. 1402, “Gang Related Firearm Enhancement,” concerning the section 12022.53, subdivision (d), enhancement allegation. That instruction did not require the jury to find Alvarado personally used a firearm in committing count 1. The court also instructed the jury with CALCRIM No. 3160, “Great Bodily Injury,” that if it found Alvarado committed counts 1 and 2, it had to decide, for each count, whether Alvarado “personally inflicted great bodily injury on . . . Ramon.” During closing

argument, the prosecutor repeatedly argued Alvarado was the principal who personally discharged the firearm as required by section 12055.53.

The jury convicted Alvarado of all the offenses and found true the enhancement allegations. At the sentencing hearing, the trial court inquired whether Alvarado intended to admit and waive a bench trial on the “prior.” Defense counsel replied, “We’re going to admit the priors, your honor.” Alvarado was silent. After advising Alvarado of his constitutional rights, the court inquired, “Then with respect to case [No.] 08CF1577, do you admit that you suffered that prior conviction, that you did serve a prior prison sentence as a result?” Alvarado replied, “Yes, your honor.” Defense counsel joined in the admission.

The trial court sentenced Alvarado to prison as follows: count 1—a minimum of 15 years to life doubled to 30 years to life because of the prior strike conviction plus 25 years to life for being a gang member who vicariously discharged a firearm causing great bodily injury; count 2—the middle term of three years doubled to six years and stayed pursuant to section 654; count 3—the middle term of three years doubled to six years and stayed pursuant to section 654; and the prior serious felony conviction—five years consecutive to count 1. The court struck the sentences on the remaining enhancements. Alvarado’s total prison term is 55 years to life on count 1 plus 5 years for the prior serious felony conviction. Neither Alvarado nor defense counsel objected to the increased sentence for the prior conviction.

DISCUSSION

I. Evidence Code Section 352

Alvarado argues the trial court erred in admitting his 2008 robbery conviction because the court did not perform the proper Evidence Code section 352 analysis. We disagree.

Section 186.22, subdivision (a), criminalizes active participation in a street gang and as relevant here, requires the prosecutor to establish members of that gang engage “in a pattern of criminal gang activity.” To establish a pattern of criminal gang activity, a prosecutor must prove gang members committed two or more specific criminal offenses within a specific time period under specific conditions. (§ 186.22, subd. (e).)

In *Tran, supra*, 51 Cal.4th at page 1044, the California Supreme Court held the prosecutor may rely on an offense defendant committed on another occasion to establish one of the predicate offenses and the offense should not be excluded based solely on the fact the prosecutor has the ability to offer evidence of other predicate offenses committed by other gang members. The court stated, however, a court must weigh the evidence’s probative value against its prejudicial effect under Evidence Code section 352, and the court may have to exclude such evidence in an individual case based on the considerations the court articulated in *People v. Ewoldt* (1994) 7 Cal.4th 380. (*Tran, supra*, 51 Cal.4th at p. 1049.)

Here, Alvarado relies on the following statement from the trial court to argue the court did not perform the proper balancing under Evidence Code section 352: “So going through that [Evidence Code section] 352 analysis, is the probative value greater than the prejudice? According to *Tran* it is.” Based on our review of the trial court’s lengthy discussion of the issue, we conclude the trial court did not conclude *Tran* requires admissibility of a defendant’s prior conviction to establish predicate offenses in all cases without considering Evidence Code section 352.

A complete reading of the trial court’s statements indicates the court concluded the *Tran* court ruled a defendant’s prior conviction is probative and may be relied on to establish a predicate offense, but the court must determine whether the prior conviction is unduly prejudicial. The trial court explained the 2008 robbery conviction originated from a source independent of the charged offenses. The court recognized that in the gang setting, a defendant’s prior conviction can be prejudicial but concluded it was

not unduly prejudicial. The court explained admission of Alvarado's 2008 robbery conviction would not confuse or mislead the jury. The court balanced the prejudicial effect of the 2008 robbery conviction against its probative value and concluded the prosecutor could offer it into evidence. The court did not abdicate its responsibility of performing the necessary Evidence Code section 352 analysis.

II. Sections 12022.53 & 186.22

Alvarado contends the trial court erred in sentencing him under both section 186.22, subdivision (b)(5)'s alternate penalty provision, and section 12022.53, subdivision (d)'s enhancement provision. Not so.

The punishment for willful, deliberate, and premeditated murder is life imprisonment with a minimum term of seven years. (§§ 664, subd. (a), 3046, subd. (a)(1).) However, when the alternate penalty provision pursuant to section 186.22, subdivision (b)(5), applies, the minimum term of imprisonment is 15 years.

Section 12022.53, subdivision (d), states: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), [s]ection 246, or subdivision (c) or (d) of [s]ection 26100, *personally and intentionally discharges a firearm and proximately causes great bodily injury*, as defined in [s]ection 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (Italics added.) Attempted murder is one of the specified felonies. (§ 12022.53, subd. (a)(1), (18).) Section 12022.53, subdivision (j), provides: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

In *People v. Salas* (2001) 89 Cal.App.4th 1275 (*Salas*), the trial court imposed a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5), on a defendant convicted of attempted murder. The evidence was equivocal as to who fired the gun used to commit the crime, and the trial court instructed the jury the section 12022.53 enhancement applied if it found defendant acted as a principal. Relying on section 12022.53, subdivision (e)(2), the Court of Appeal reversed the imposition of the 15-year minimum term finding, “Defendant is correct in his assertion that since he was never found to have *personally* used a firearm, . . . section 186.22, subdivision (b)(5)[,] . . . is inapplicable to this case.” (*Salas, supra*, 89 Cal.App.4th at p. 1281.)

Here, it is true the prosecutor did not allege Alvarado personally used a firearm as to count 1, attempted murder. But the prosecutor did allege, the trial court properly instructed on, and the jury found Alvarado personally used a firearm as to count 2, assault with a firearm. *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), is instructive.

In that case, the jury found defendant personally used a firearm within the meaning of section 12022.53, subdivision (d), as to all three charged counts, but the information included that allegation for only two of the counts. (*Riva, supra*, 112 Cal.App.4th at p. 985.) The trial court imposed sentence, including a section 12022.53, subdivision (d), enhancement, on the count that lacked a section 12022.53, subdivision (d), allegation, while staying the other two counts. (*Riva, supra*, 112 Cal.App.4th at p. 1000.) The *Riva* court held that, although the issue was “close,” imposition of the section 12022.53, subdivision (d), enhancement did not violate the statutory scheme or defendant’s due process rights. (*Riva, supra*, 112 Cal.App.4th at p. 1002.) The court stated, “[T]he prosecution complied with the literal requirements of sections 12022 .53, subdivision (j) and 11701, subdivision (e) by pleading the enhancement in other counts in the information.” (*Riva, supra*, 112 Cal.App.4th at

p. 1002.) The court explained failure to plead the enhancement on that count did not interfere with defendant's "ability to contest the factual bases of the enhancement," as he had notice from the other counts he had to defend against a section 12022.53, subdivision (d), enhancement. (*Riva, supra*, 112 Cal.App.4th at p. 1003.) The same was true here. Although the better course is to allege each enhancement as to each count, we are confident based on the record before us the jury concluded Alvarado personally used a firearm as to count 1.

III. Prior Conviction

Alvarado asserts he never admitted he suffered a prior serious felony or strike prior. Again, we disagree. In *People v. McGee* (2006) 38 Cal.4th 682, 685, the California Supreme Court opined in determining whether a defendant is subject to increased punishment for a prior conviction, it is the trial court that determines whether an alleged prior conviction qualifies as a conviction under an applicable sentence enhancement provision.

Here, Alvarado parses the trial court's statements and argues he only admitted he suffered a prior prison term. Actually, when read in its entirety, Alvarado admitted he "suffered that prior conviction" and he "serve[d] a prior prison sentence as a result." Alvarado admitted he suffered the only prior conviction he was alleged to have suffered: the 2008 robbery conviction in case No. 08CF1577 in the Orange County Superior Court. It was then within the trial court's discretion whether to sentence him to increased punishment based on his admission. Both before and after trial, Alvarado waived his right to a jury trial on the truth of the prior conviction. Additionally, neither Alvarado nor defense counsel objected to his increased sentence as a result of his prior strike conviction. The trial court's sentence was proper.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.